

1 IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W.A.)
3 DREW EDMONDSON, in his capacity as)
ATTORNEY GENERAL OF THE STATE OF)
4 OKLAHOMA and OKLAHOMA SECRETARY OF)
THE ENVIRONMENT C. MILES TROBERT,)
5 in his capacity as the TRUSTEE FOR)
NATURAL RESOURCES FOR THE STATE OF)
6 OKLAHOMA,)
)
7 Plaintiff,)) Case No.
8 -vs-)) 05-CV-329-GKF-PJC

15 TRANSCRIPT OF PROCEEDINGS.

16 held before the Honorable Paul J. Cleary, Magistrate
17 Judge in the United States District Court for the
18 Northern District of Oklahoma on April 7, 2009.

19 A P P E A R A N C E S

20 For the Plaintiff: Mr. Louis Bullock
21 Mr. David Riggs
22 Ms. Ingrid Moll
23 Ms. Claire Xidis
Mr. Robert Nance
Mr. Robert Blakemore and
Mr. Dan Lennington
Attorneys at Law

(Appearances continued . . .)

1 (Appearances continued . . .)

2 For Defendant Cargill: Mr. John Tucker and
3 Mr. Del Ehrich
Attorneys at Law

4 For Defendant Peterson: Mr. Philip Hixon
5 Attorney at Law

6 For Defendant Tyson: Mr. Robert George
7 Attorney at Law

8 For Defendant Cal-Maine: Mr. Robert Redemann
9 Attorney at Law

10 For Defendant Simmons: Mr. John Elrod and
11 Mr. Bruce Freeman
Attorneys at Law

12

13 P R O C E E D I N G S

14 COURTROOM DEPUTY: Case Number

15 05-CV-329-GKF-PJC, Attorney General of the State of
16 Oklahoma, et al. versus Tyson Foods, et al. Counsel,
17 will you please state your appearances for the record.

18 MR. BULLOCK: Louis Bullock for the State of
19 Oklahoma.

20 MS. MOLL: Ingrid Moll for the State of
21 Oklahoma.

22 MR. RIGGS: David Riggs for the State of
23 Oklahoma.

24 MR. LENNINGTON: Dan Lennington for the State
25 of Oklahoma.

1 MR. NANCE: Bob Nance for the State of
2 Oklahoma.

3 MR. TUCKER: John Tucker for the Cargill
4 defendants.

5 MR. GEORGE: Robert George for the Tyson
6 defendants.

7 MR. EHRICH: Del Ehrich for the Cargill
8 defendants.

9 MR. GRAVES: James Graves for George's
10 defendants.

11 MR. FREEMAN: Bruce Freeman for Simmons.

12 MR. REDEMANN: Robert Redemann for the
13 Cal-Maine defendants.

14 MR. HIXON: Philip Hixon for Peterson Farms.

15 MR. ELROD: John Elrod for Simmons.

16 THE COURT: All right. Let me start off with
17 two preliminaries. 729, motion for attorney fees. Mr.
18 Bullock, do you have anything to report on that?

19 MR. BULLOCK: I spoke to, I believe, Mr.
20 Tucker. He said he was going to get some folks together.
21 I believe it was Mr. Tucker.

22 THE COURT: This is the attorney fee --
23 (Interrupted)

24 MR. BULLOCK: Yes. This is the attorney fees.
25 We're supposed to have a conference -- I'm sorry. In the

1 chaos of this, it has fallen through the cracks. But I
2 did speak with one of the defense lawyers and he said he
3 was going to get some folks together and then both of us
4 got otherwise diverted.

5 THE COURT: All right. On 1921, which is the
6 motion to reconsider the ruling about the attorney
7 general's deposition with respect to e-coli in Locust
8 Grove, I'm going to deny the motion to reconsider. I
9 think it's irrelevant. Locust Grove is not within the
10 Illinois River Watershed and we're so late in the day to
11 be opening the door to that issue that I just don't think
12 that's appropriate. So the motion to reconsider will be
13 denied.

14 Now, we have a host of discovery issues here
15 which are presenting a real problem, as you can see, with
16 the efficient adjudication of this case. I mean, we have
17 had a schedule in place here for quite some time. I
18 think the last schedule was set in March of '08, so for
19 more than a year now we've known well the deadlines were
20 discovery cutoff is to be April 16th. And now we've got
21 a host of motions that would reopen document discovery
22 and tie into orders that Judge Joyner entered months and
23 even years ago as well as 30(b)(6) depositions, and then
24 we have all these experts and everybody else that needs
25 to be scheduled. I guess the message out of all this is

1 that we're going to try and adhere to the schedule. So
2 if that means that we have to do a lot of deposition
3 between now and April 16th, then that's what we'll have
4 to do. But there's going to have to be some rational
5 recognition on everybody's part that that may mean some
6 tough choices here in terms of how we get certain
7 information and if we have to go past the April 16th
8 deadline which we've allowed for certain expert
9 depositions, if we're going to do that, obviously that
10 could impact the dispositive motion deadline. And so for
11 example, on the Joint Motion 1953 for discovery beyond
12 April 16th in which it's proposed that six depositions of
13 state experts take place between April 23rd and June
14 30th, certainly some of those if not all of them would be
15 close to or past the dispositive motion deadline which
16 might mean, fine, you can take them but you're not going
17 to be using them in support of the motion for summary
18 judgment. I don't know whether you're planning on doing
19 that or not, but if you're going to change the schedule
20 as it were by agreement and say, okay, we'll take
21 depositions in June and that's the only time it can be
22 done, then we're going to have to make some accomodation
23 between that and the fact that Judge Frizzell is
24 expecting dispositive motions to be filed on the 18th and
25 we're not going to want supplementation stretching that

1 out because it's going to bust every other deadline on
2 this schedule and it will affect the trial date of
3 September. So, that's kind of the starting point for the
4 analysis here.

5 Let me ask a question about the 30(b)(6)
6 deposition Cargill wants to take as well as the
7 discovery. And let me ask first: As I understand it,
8 there were 30(b)(6) depositions taken by Cobb-Vantress in
9 April of '08 and by Peterson Farms in July of '08; is
10 that correct?

11 MR. NANCE: Actually, Your Honor, the August
12 '08 depositions were taken on behalf of all of the
13 defendants and not just Peterson.

14 THE COURT: I show that as July, but it was in
15 August of '08?

16 MR. NANCE: I think they noticed the date in
17 August, but it may have come out in July.

18 THE COURT: All right. And then the
19 Cobb-Vantress was specific to Cobb-Vantress?

20 MR. NANCE: Yes.

21 THE COURT: That was April of '08?

22 MR. NANCE: Yes. Although in out view, they
23 were done jointly in keeping with the agreement we had
24 before Magistrate Joyner.

25 THE COURT: Could I have you step up to the

1 microphone just so I can make sure that your voice --
2 (Interrupted)

3 MR. NANCE: Certainly, Your Honor.

4 THE COURT: How many witnesses did the state
5 provide to respond to those 30(b)(6) topics?

6 MR. NANCE: Your Honor, I don't have a count.

7 It would have been in excess of a dozen. They each had
8 multiple points and we had to educate people. And
9 obviously, we chose the people we thought who had the
10 best subject matter knowledge to start with but then we
11 had to educate them.

12 THE COURT: So, is it fair to say that in April
13 of '08 when Cobb-Vantress did their 30(b)(6) that more
14 than a dozen people were produced over what period of
15 time, a day or two or three?

16 MR. NANCE: We scattered them out a couple of
17 days at a time. They had topics like waste water
18 treatment plants on a variety of subjects and we started
19 rolling with our various people and kept agreeing as to
20 dates to do the next one. But it took weeks to prepare
21 them and many days to present them. We presented one guy
22 twice as a 30(b)(6) witness and a third time as an
23 individual. So he was deposed three times. It was an
24 elaborate operation both times.

25 THE COURT: And in August of '08 when you say

1 all the defendants did their questioning, again are we
2 talking about a dozen witnesses there again?

3 MR. NANCE: Yes. It was in excess of a dozen.

4 Between a dozen and two dozen on both go arounds, I would
5 say.

6 THE COURT: Altogether?

7 MR. NANCE: Altogether, yes, sir.

8 THE COURT: So, if now that Cargill says, well,
9 we didn't get to ask or didn't ask for whatever reason
10 our specific Cargill questions, I think it's been
11 proposed the state would be willing to produce a 30(b)(6)
12 on April 13th? Is that the date that was suggested?

13 MR. NANCE: The original date that had noticed
14 by the Cargill defendants was April 3rd. Of course, it's
15 our proposal that they should not get to take this at
16 all. But if the Court decides otherwise, we have offered
17 the date of April 13th which is Monday of next week to
18 put up a witness.

19 THE COURT: A witness?

20 MR. NANCE: We believe we would have a single
21 witness and believe under the rules that a single day
22 would be appropriate.

23 THE COURT: But on these other occasions you
24 had, you say, a dozen witnesses to handle all these
25 various topics. How is it we're going to be able to get

1 through the Cargill material with just one witness? I
2 mean, is that reasonable?

3 MR. NANCE: It will be a challenge. If we had
4 to go into a second day or after we start prepping the
5 witness that we find that we can't get one witness to do
6 it, we'd have to offer a second one. But at this point
7 with everything else going on, that's the time that we've
8 had available and we've got a witness available. And in
9 the alternative if you don't grant the motion in its
10 entirety, that's when we would propose to do it unless
11 their motion to extend beyond the deadline -- tomorrow,
12 perhaps that's not going an issue. We would go ahead and
13 have to get it done next week.

14 THE COURT: I'm trying to figure out if there's
15 a way to shortcut the 1933 and 1941 which is all this
16 paper discovery that they want supplemented and added to.
17 And frankly, as I go back and look at that, it takes me
18 back through all these previous orders that Judge Joyner
19 entered and whether documents were Bates numbered or
20 whether they were clipped and filed. And it seems to me
21 that going down that road at this stage of the game is
22 going to be highly unproductive. Now, if we could
23 accomplish the same thing by expanding the scope of the
24 30(b)(6) deposition and allowing it and perhaps giving
25 some additional time to get it done, that might be the

1 fastest way to cut through this because having you people
2 chase down documents and supplement stuff -- and I've
3 looked at, for example, the request for admission and I
4 find a lot of those problematic. I just don't think that
5 request for admission that were served in this case in
6 February are -- many of them seem to be inappropriate. I
7 think on the first one the state answered it as best it
8 could given the vagueness of the some of the terms. I
9 think there's one in which the state could maybe have to
10 do a better job of whether or not they're got evidence of
11 tracing the pollutants to specific defendants through DNA
12 or whatever. I can't -- frankly, when I read your
13 answer, I couldn't tell whether you were denying or
14 admitting it. But I think with some clarification on
15 those, that's my only comment. On other stuff, it gets
16 so labor intensive for both the Court to go back and try
17 and figure out what you people were doing way back when,
18 in 2007, and what Judge Joyner ruled, that if would
19 accomplish that 30(b)(6) I think would have been the
20 fastest way to do it. Mr. Tucker, do you have any
21 comment on that? If you talk in the microphone there at
22 the table, you can stay seated.

23 MR. TUCKER: I think Your Honor's suggestion is
24 probably the common sense thing to do. I was prepared to
25 go through them point-by-point with you this afternoon,

1 but your position is certainly understandable and I think
2 the position is well-taken.

3 THE COURT: From what I've read in the state's
4 response and I think there's validity to all of it on
5 both sides, that to go forward now and try and tell you
6 specifically where chicken litter was put on a piece of
7 land in the IRW, one, I just -- after four years of
8 litigating this case or three and a half years, if we
9 don't have a pretty good idea of that then --

10 (Interrupted)

11 MR. TUCKER: I guess the whole point behind all
12 this, that the 30(b)(6) deposition is as good a way to
13 accomplish it as any is that it's our position that in
14 order for the state to recover against Cargill, it's got
15 to prove that Cargill participated, that Cargill was a
16 contributing cause or a proximate cause of the damages,
17 of the harm, the violations they're complaining about.
18 And the state sums it's case up to me the clearest way in
19 document 1963 at page 23 when they say the state has
20 alleged and will prove that the Cargill defendants as
21 well as the other defendants have all polluted the waters
22 creating an indivisible injury and therefore are jointly
23 and severally liable. The state will present a
24 circumstantial case showing production of massive
25 quantities of waste by the defendants including Cargill.

1 Transport of that waste to the waters and resulting
2 injury.

3 Well, their theory of the case is, as we
4 understand it, that don't have to prove any specific acts
5 or commissions by Cargill or its growers. Our belief is
6 that they do. In order to frame that case, that
7 position, for Judge Frizzell to decide, they have to take
8 an up or down position of whether they do or do not have
9 Cargill specific evidence. That's all we hope to
10 accomplish by the 30(b)(6) depositions.

11 THE COURT: Mr. Nance.

12 MR. NANCE: Your Honor, if that's all they hope
13 to accomplish, they don't need a 30(b)(6) deposition,
14 they simply file a summary judgment motion setting forth
15 their theory and they're either right or they're wrong.
16 And we meet it with whatever evidence we have. If we
17 don't have adequate evidence to plead a circumstantial
18 case or any other kind of case, they'll win.

19 THE COURT: Well -- (Interrupted)

20 MR. NANCE: And we don't have to go through
21 this belated discovery, you know, two weeks before the
22 close of discovery to have to put up a 30(b)(6) witness
23 that marshals the entire case against Cargill.

24 THE COURT: Well, having looked at this, I
25 agree. I think a lot of this comes so late in the game

1 that it's problematic. However, I think that there
2 probably is an entitlement to additional information and
3 I'm just trying to find a way to advance the ball here so
4 that we get this thing going down the road. One of the
5 parties or maybe both of you cited this case out of
6 Colorado that Magistrate Judge Mix had an issue with
7 30(b)(6) depositions coming late in the game and she
8 basically said, okay, I'm not going to bar you from
9 taking the 30(b)(6), but here's what you do, you sit
10 down -- the taking party -- you sit down and prioritize
11 the topics and you tell the other side ahead of time the
12 sequence in which you're going to take up those topics
13 and that's the sequence they will be taken up and you go
14 through them. And in her case, she said when you hit the
15 seven hour mark, you're done. Period. You're done.
16 Now, that's similar to what I'm thinking about here is to
17 give Cargill the opportunity to get some specific
18 information if they really want additional discovery that
19 would have been provided in the form of interrogatories
20 or whatever, they can use that opportunity. But at least
21 they'll prioritize it and have seven hours, let's say, or
22 maybe a little bit more than that if need be to run
23 through this stuff and get it and just get it done. And
24 when the time -- when the gun goes off, they game is over
25 and that discovery is done.

1 MR. TUCKER: Your Honor, if I might observe,
2 the plaintiffs took six and a half days of their 30(b)(6)
3 depositions of the Cargill witnesses and I think seven
4 hours is going to be plainly inadequate to get this
5 accomplished.

6 THE COURT: What are you suggesting?

7 MR. TUCKER: I'm not suggesting that we have
8 six and a half days, but I'm suggesting that we be
9 permitted to start out with two days and see how well
10 they perform and how well we're able to move through and
11 I think prioritizing and giving the plaintiff some order
12 in which we'll ask those questions is entirely
13 reasonable.

14 MR. NANCE: I think if it's going to happen at
15 all, prioritizing is a great idea. However, the Cargill
16 defendants have the benefit of our entire -- or soon will
17 have our entire case with the completion of other
18 depositions that people will talk about. They don't need
19 to get from us -- if I understand the intent of their
20 30(b)(6) notice, they don't need to get our general case,
21 they need to get the instances of Cargill specific cases.
22 And I don't know that you need two days to do that.

23 THE COURT: The reason I was expanding it a
24 little bit beyond the seven hours is because I'm also
25 trying to roll into this anything that's left over in the

1 paper discovery that they say they need, any information
2 there to give them a little more leeway on that side so
3 that we don't have you guys having to go chase down
4 rabbit trails on that side. Interrogatory answers and
5 supplementation, interrogatory answers and request for
6 production and doing things that it sounds to me as I go
7 back and read the record here, it's going to be very
8 difficult to do given that, you know, early on Judge
9 Joyner said, well, we can produce documents that are
10 Bates numbered in response to each interrogatory. Then
11 we find out that they're not Bates numbered. So then
12 they're clipped and filed and indexed. And then the last
13 thing I read is if that physical representation is not
14 really being done any more, they need copies of those or
15 how are we going to accomplish this supplementation and
16 additional information. I don't think you can do a
17 30(b)(6) -- fastest way.

18 MR. NANCE: Judge, in effect what we would have
19 to do in the 30(b)(6) route is gather those documents
20 because there's no way you can educate a human being that
21 farmer Jones' waste from his barns went to thus and such
22 location. You've got to have the documents with you. A
23 human being cannot memorize that.

24 THE COURT: Are you suggesting it would be
25 easier for the state to go the document route --

1 (Interrupted)

2 MR. NANCE: I don't think so, but I wanted you
3 to appreciate what the preparation would be.

4 THE COURT: Right. So we may need some
5 additional time for preparation. I understand that.

6 MR. NANCE: I would think so. But if they
7 wanted to prioritize and say, you know, here's our order
8 of priority and we had a reasonable time to educate a
9 witness on that, we'd be doing much the same thing maybe
10 killing two birds with one stone.

11 THE COURT: That's what I'm hoping to do. Mr.
12 Tucker, how long would it take Cargill to prioritize both
13 on the 30(b)(6) topics you've listed and any, we'll call
14 it, supplemental or mop up discovery that was included in
15 Document 1941?

16 MR. TUCKER: Your Honor, we could get those
17 prioritized possibly by Friday but certainly by Monday.

18 THE COURT: All right.

19 MR. TUCKER: The only reason I say possibly by
20 Friday is we've got some days as many as five depositions
21 this week.

22 THE COURT: So if they prioritize by Monday,
23 Mr. Nance, how long do you think it would take to do the
24 preparation for the 30(b)(6)?

25 MR. NANCE: I can't really see what pig is in

1 that poke, Judge, or in their case turkey. It depends on
2 the list. If it's a relatively simple, straight forward
3 list, then we could do it pretty quickly. If --
4 (Interrupted)

5 THE COURT: If they originally said the 3rd and
6 you were offering up somebody on the 13th, I mean,
7 somebody, I assume, is ready to go on some of these
8 topics -- (Interrupted)

9 MR. NANCE: Or would be on Monday.

10 THE COURT: Yes.

11 MR. NANCE: I wouldn't represent that they're
12 ready here on Tuesday afternoon.

13 THE COURT: Right. So I'm just thinking even
14 if you had to do your two days but they were split apart
15 and you had to prep somebody for the first round and then
16 prep somebody for the second round, maybe the thing to do
17 is have you folks try and work out maybe prioritizing I
18 think is a good idea, but then some topics you may say we
19 can do this one, this area, pretty quickly but we're
20 going to have to prep somebody on this second priority --
21 (Interrupted)

22 MR. NANCE: That very well could be the case.

23 THE COURT: Why don't we have Cargill give you
24 a list of -- prioritize the topics that you would have
25 for a 30(b)(6), Mr. Tucker, by Monday and then give the

1 state an opportunity to look at that and then confer
2 about it and see if you can come up with a plan for,
3 we'll say, two days of 30(b)(6) to get through whatever
4 topics were in the 30(b)(6) notice originally and if
5 there's something specific in the discovery that rather
6 than go going the road of compelling complete responses
7 that would mop it up in the 30(b)(6) and see if that will
8 get it done. And get that -- you folks try to work that
9 out and lay out a schedule by next week.

10 MR. TUCKER: By Wednesday say, Your Honor?

11 THE COURT: Can you do that, Mr. Nance? Do you
12 think Wednesday is realistic?

13 MR. NANCE: I really don't, Judge, because one
14 of my compatriots in the attorney general's office is
15 going to be -- he's going to be doing some depositions,
16 I'm going to be doing one next week. I don't know
17 whether we're going to see each other. I would suggest
18 either Friday of next week or Monday of the following
19 week.

20 THE COURT: Let's say by Friday because we do
21 want to try and move this along. We're talking about
22 Monday is the 13th, and then -- (Interrupted)

23 MR. NANCE: 17th?

24 THE COURT: 17th. And then work out that
25 schedule and then you can start taking those -- I guess

1 you better report back to the Court what you're taking
2 about, because the depositions get too far out there,
3 then we've got another problem. I mean, we're trying --
4 right now we've extended at least some of this discovery
5 until mid-May. I have no problem with going through the
6 end of April on fact witnesses, 30(b)(6). When we start
7 pushing beyond that, then we're going to have to -- may
8 have to talk about it. We've got some experts that we're
9 going to allow you to finish up by, I think, May 15th,
10 so maybe May 15th is a reasonable deadline for as much of
11 this discovery as possible.

12 MR. TUCKER: Responding to Your Honor's
13 concerns -- and we share those same concerns -- that
14 subject to the state's being able to accomplish it, we'd
15 like to try to do this the week of the 20th which would
16 be the week after next.

17 THE COURT: Week of April 20th.

18 MR. TUCKER: That would give us -- that would
19 not be that pressing the other dates.

20 THE COURT: Why don't you see with that in mind
21 as the target goal?

22 MR. NANCE: I'm sorry. I was conferring with
23 the attorney general. What was the date?

24 THE COURT: He's talking about the week of
25 April 20th.

1 MR. NANCE: I will see what we can do.

2 Obviously, Your Honor, we're not having so much fun that
3 we want to prolong it.

4 THE COURT: All right. So why don't we see if
5 we can get the Cargill 30(b)(6) done somewhere in that
6 timeframe of the week of April 20th, either at least the
7 first day or hopefully both days and get it finished.

8 MR. NANCE: Judge, may I clarify one thing?

9 This is going to be Cargill specific information and not
10 every defendant specific -- (Interrupted)

11 THE COURT: That's right.

12 MR. NANCE: Thank you.

13 THE COURT: This is Cargill's only. The
14 others, as far as I know, have either taken or
15 participated in the other depositions. The only motion
16 that I've got was -- has to do with your motion for
17 protective order against the Cargill defendants only who
18 served this 30(b)(6) notice, so it's only Cargill.

19 MR. NANCE: All right, sir. Thank you.

20 THE COURT: All right. Let's take a look at
21 Number 1940 which is Cargill's motion to compel complete
22 expert disclosures. And if I recall correctly, is this
23 the one where we've got the issue of what expert is
24 espousing what opinion? Is that the issue here?

25 MR. EHRICH: Del Ehrich for Cargill. It is,

1 Your Honor.

2 THE COURT: Okay.

3 MR. EHRICH: Your Honor, the question presented
4 to you is whether these defendants should get less than
5 what Rule 26(a) requires the plaintiff to disclose to us.
6 And seven testifying experts and -- (Interrupted)

7 THE COURT: This is on the natural resource
8 damages, isn't it?

9 MR. EHRICH: It is. You'll remember end of
10 February we were in front of you regarding the
11 plaintiff's damage expert reports prepared by Stratus and
12 several other experts. A contingent valuation --
13 estimated future damages and then forecasting
14 hind-casting them into the past.

15 THE COURT: Right.

16 MR. EHRICH: Your Honor, first of all, we've
17 been criticized for bringing this up on an untimely
18 basis. If there's some -- if the Court has felt
19 inconvenienced by that, you have our -- my apologies. We
20 hesitated to bring this before you because it seems to us
21 that the mandate of Rule 26 is so clear. If a party has
22 an expert witness, Rule 26(a) requires the identification
23 of that witness and a statement of what that testifying
24 expert will testify to and the bases therefore. And what
25 the plaintiff has consistently told us is, we've got

1 seven testifying experts. We can tell you who maybe lead
2 authors are, and that's it. And further, they've been
3 unwilling to accommodate us as we've -- bring this issue
4 before the Court and so we already yesterday started
5 depositions of the person -- the member of that seven
6 person team who supposedly could give us the roadmap --
7 (Interrupted)

8 THE COURT: Was that mister -- (Interrupted)

9 MR. EHRICH: Mr. Chapman.

10 THE COURT: So you did start with Chapman.

11 MR. EHRICH: We did start with Mr. Chapman.

12 And let me describe it this way: Not only do we not have
13 a proper Rule 26(a) written disclosure, Mr. Chapman
14 really was not able to give us the roadmap, not if by
15 roadmap you mean who is the testifying expert, whether he
16 indeed is a testifying expert and if so, what opinions he
17 may be asked to render. Instead, he has said, well, you
18 know, I was essentially a traffic cop. That's my
19 characterization. I don't think he used those words. He
20 can tell us who started drafting various portions of
21 those reports, but thereafter what he said was it was a
22 collaborative process, an iterative process, we all
23 worked on it together. We've got no reason to think,
24 Your Honor, that that wouldn't be the same result for the
25 remaining six. And at the end of the day we will not

1 know who the testifying expert or experts is or are, not
2 know what they are going to say, and in fact, this all
3 will have been a pointless exercise. Now, why we place
4 so much emphasis on this. Well, not only because we
5 don't want to take seven depositions at the end if we
6 don't have to. Mr. Nance has complained about the
7 deposition blitzkrieg. Well, why should we be wasting
8 resources? We want to know who is the testifying expert
9 or experts and what role they're going to be called to
10 testify, what their opinions are so that we can test
11 whether they truly are qualified to offer those opinions,
12 whether they were involved enough in the preparation of
13 the report to offer those opinions, or instead whether
14 they are relying on undisclosed experts. I mean, the
15 last time I looked at Judge Frizzell's courtroom, Your
16 Honor, there's a single witness chair. All seven are not
17 going to be perched up there at trial testifying. And I
18 think it is clear, clear, that they cannot call --
19 plaintiffs can't call each one of these seven experts to
20 testify about the same things. I mean, they're
21 experienced trial counsel. They know that after the
22 first one Judge Frizzell is likely to sustain an
23 objection that this is cumulative under 403. So, if
24 they -- they either intend to call one as an integrated
25 expert or they intend to call, you know, one, two, four,

1 I don't know, in discrete roles building on each other.
2 Either way, we're entitled to know so that we can test
3 those opinions, test whether anybody says, you know what,
4 I'm the expert, I'm responsible for those opinions,
5 here's what I did. So, our worry is that we're being
6 forced to waste resources that at the end of this process
7 without relief from this Court we are still not going to
8 know what we're entitled to under Rule 26.

9 Now, everybody's been -- everybody's throwing a
10 lot of resources at this case. What happens at the end
11 of the big case? We started yesterday Mr. Chapman's
12 deposition under protest, tomorrow we've got one
13 deposition scheduled, Mr. Tourangeau. Here's what we
14 propose. We go forward with Dr. Tourangeau, we vacate
15 the depositions scheduled for Friday, next Wednesday and
16 Thursday, that the Court be required to tell -- that the
17 Court require the plaintiff to tell us who are the
18 testifying experts, what are their opinions and what
19 roles. Once we've assessed that, we decide which ones go
20 forward. We might do the remaining five or we might not.
21 But we will then be in a position to make an informed
22 decision and that what whatever these depositions are the
23 Court allows, we be allowed basically to finish them
24 before May 1. That's what we suggest, Your Honor. And
25 indeed, we're willing to live with that. We've disclosed

1 rebuttal expert reports on March 31, two reports, the
2 first one prepared by two eminent economists, Bill
3 Desvouges, Gordon Rousser, a second prepared by three of
4 our liability experts, Connolly, Sullivan, Colbert. Sort
5 of sounds like a band. As to Desvouges and Rousser what
6 we said is, look, Desvouges, he's the testifying expert.
7 He'll testify to all matters in this report. Now, we may
8 call Dr. Rousser to testify about certain statistical
9 analyses an econometric analyses or not, depending on
10 time limitations. But Desvouges is a testifying expert.
11 And as to the liability experts, Connolly for certain
12 sections, Cole for a discreet section, meaning the third
13 author, Dr. Sullivan, isn't to be called. So with that
14 information, the plaintiffs can make a decision. They
15 may choose to depose only Dr. Desvouges. They may
16 choose to depose Desvouges, Dr. Rousser. On the
17 liability side, Connolly, Cole, probably not Sullivan, or
18 if they want Sullivan for some reason, they can. But
19 they can make an informed decision and that's not what
20 they've allowed us to do.

21 THE COURT: Mr. Nance, are you going to address
22 that one too?

23 MR. NANCE: Ms. Moll.

24 THE COURT: Again, as a predicate, as I
25 interpret Rule 26, I would think you would be obligated

1 to say what experts are going to testify as to what
2 opinions. Let me ask you first. Have you decided -- has
3 the state decided at this point that any of these
4 witnesses on any of these various topics whether some of
5 them are just not going to be called to testify? Has
6 there been any decision in that regard that might help
7 us?

8 MS. MOLL: We have not, Your Honor. This is
9 not an issue of, you know, we have information and we're
10 just being cute and not willing to share it with the
11 Cargill defendants. That's not the case. As Your Honor
12 knows, there is no pretrial order that's been put in
13 place in terms of identifying trial witnesses, and so we
14 have not made a decision as to which of the seven will
15 testify within their areas of expertise. And of course,
16 the Court at some point will decide how much time each
17 side gets. And so, depending on that order, it may be
18 that the state decides to put on a more fulsome
19 presentation. But until we know that information we're
20 not able to commit. And Rule 26 -- as the expressed
21 language of Rule 26 requires, you simply have to disclose
22 who may testify at trial, doesn't say who will but who
23 may, and we've done that. And we have produced the
24 reports that outline the opinions of those experts.

25 And I would, if I could, Your Honor, like to

1 take a moment to talk about the timeliness of their
2 motion. As we have set forth in our position brief, the
3 state feels that that motion is untimely. And although
4 the rules do not expressly provide for a timeline by
5 which a motion to strike or in the alternative compel has
6 to be filed, there is a reasonableness standard that's
7 within the rules. And when you look at the time line and
8 we've set it out in our brief thoroughly, but if I could
9 highlight a few dates. On January 5th of this year the
10 state produced its expert reports on damages, and of
11 course, two of those are at issue in Cargill's motion to
12 strike. I'll refer to them as the CV report and the past
13 damages report as we've described them in our brief. So
14 that was on January 5. Let me make one comment about a
15 statement that Cargill makes in their motion. They make
16 the statement that I'm quoting from page two of their
17 motion: The plaintiffs provided two natural resource
18 damages reports in January and February of 2009. That is
19 simply false. Those reports were both provided on
20 January 5th in a timely manner and that's just beyond
21 dispute. Five and a half weeks past following January 5.
22 And we only then heard for the first time that the
23 Cargill defendants had any issue with those reports
24 compliance with Rule 26, so five and a half weeks later.
25 The following day the state made its position clear that

1 Rule 26 had been complied with and that it was not
2 appropriate to ask for separate disclosures on behalf of
3 each author of the report above and beyond the
4 multi-authored report, reports that had been filed or
5 produced rather. The same day that the state made its
6 position clear on that issue, as Your Honor may recall,
7 the Cargill defendants filed a separate motion to compel
8 on a separate issue relating to the survey respondents
9 identities. That motion could have but did not challenge
10 the state's compliance with Rule 26 in the manner that's
11 now described and at issue in their motion to strike.
12 So, going back, we produced the reports on January 5th,
13 we didn't hear from anyone about Rule 26(a) until five
14 and a half weeks later. Another three and a half weeks
15 pass and the issue only then resurfaced. The parties
16 went round and round for another two and a half weeks
17 beating the meet and confer horse to death, and then when
18 we -- you know, with three weeks left in the discovery
19 deadline do we see the Cargill defendant's motion to
20 strike the report and the alternative to compel a
21 separate report. So based on that history, we feel that
22 the motion to strike should be denied as untimely.

23 THE COURT: It was filed -- I mean, the motion
24 to compel was filed within the discovery time period.

25 MS. MOLL: That is true.

1 THE COURT: That generally is somewhat the
2 bright line rule. I can understand that when we're
3 talking a case of this complexity even to wait until the
4 10th hour if not the 11th hour may be pushing it in terms
5 of enabling the Court to make any rational analysis of
6 the issues and get orders done in time to keep you on
7 track with this schedule Judge Frizzell has entered.
8 Having said all that though, at least in most of the
9 orders I've seen, if you file a motion to compel before
10 the discovery cutoff, at least you can argue that you've
11 been timely. So, I understand your position.

12 MS. MOLL: Yes, Your Honor. As a substantive
13 matter though, Rule 26 -- and the Cargill defendants
14 admit this. Rule 26 does not prohibit multi-authored
15 reports. And as we've laid out in our brief, the
16 defendants themselves have produced multi-authored
17 reports and have not produced separate disclosures for
18 each of the authors.

19 Let me address quickly if I could some of the
20 case law that the Cargill defendants cite in their brief.
21 They simply do not cite any authority for the notion that
22 any multi-authored report is improper and admit that it's
23 not improper. But they also cite -- they do not cite any
24 authority for the principle that when you have a
25 multi-authored report, that there is some obligation to

1 go above and beyond that and produce separate disclosures
2 for each author. They cite a handful of Rule 26 related
3 cases. And let me just address them quickly if I could.
4 In the In Re: Sulfuric Acid case -- and all these cases
5 notably are not from this jurisdiction. But in the In
6 Re: Sulfuric Acid case the defendants in that case moved
7 to bar the testimony of two experts and that motion was
8 denied. So that's of little instructive value here to
9 the Cargill defendants. The remaining three cases that
10 they cite for their Rule 26 proposition have no
11 application at all because the issue in those cases was
12 the brevity of the expert reports that were produced in
13 the case and no one has suggested that the CV report is
14 brief. In the Krischel case there was a one and a half
15 page letter from one of the experts and the other one --
16 and the other expert didn't produce an expert report at
17 all. In the Reed case the expert reports did not include
18 issues of compensation, did not provide the materials
19 considered, did not identify prior testimony or documents
20 relied on. And in the Smith case the reports amounted to
21 nothing more than, you know, two pages plus the
22 incorporation of the interrogatory response. So, in
23 their reply they take us to task for not responding to
24 their case log, but it simply does not support them.

25 As I mentioned earlier, Rule 26 uses the word

1 may and requires the disclosure of experts that a party
2 may call at trial. And the Cargill defendants and any
3 others who join this morning are suggesting that the
4 state at this juncture, five months prior to the trial,
5 that the state must commit to who will testify at trial
6 and otherwise limit itself regardless of any court order
7 on the length of trial and also keeping in mind that, you
8 know, I'm sure there will be an active motions in limine
9 practice in this case. So as we stand here today, we
10 don't know what will be in, what will be out, how long
11 the trial will be. And it may be that if the Court gives
12 us more time, we would decide to put on a more fulsome
13 presentation as to the CV study. And so, as I stand here
14 today, I cannot commit to who will testify on which
15 topics, but we have disclosed all the opinions which
16 appear in the damages reports.

17 THE COURT: Could you not at least disclose if
18 you're not going to disclose which witness is necessarily
19 going to testify as to which opinion? Could you not at
20 least identify for the defendants which opinions each
21 particular witness would be able to testify should they
22 testify at trial? In other words, say, all right, here's
23 the seven of them. We don't know who for sure is going
24 to be the witness, but we will tell you this, that
25 Chapman who would be -- could testify on the following

1 list of opinions, Bishop could testify on this list,
2 Hanemann on this, but maybe not on this other one. In
3 other words, narrow it down so that if they have to go
4 through and take seven depositions, if as they say for
5 example, Mr. Chapman hasn't been able to really give them
6 a roadmap, and I don't know whether the roadmap is who
7 specifically is going to testify on this opinion, but at
8 least the roadmap it seems to me should include who could
9 testify on those opinions. So that at least when they go
10 in and start a deposition of Morey, let's say, they know
11 that that the area to focus on would be opinions two,
12 four and five not these other ones. Could not that be
13 done?

14 MS. MOLL: Your Honor, I submit that we've
15 already done that. Attached to -- (Interrupted)

16 THE COURT: I know you've broke down some
17 things by chapter and -- (Interrupted)

18 MS. MOLL: That's right. But those chapters
19 relate to specific phases of the work that was down, for
20 example, in implementation of the main survey. There's a
21 limited number of the experts who would testify on that
22 and I would suggest that we've already done that by
23 producing the breakdown by chapter.

24 THE COURT: But for example, if it's -- say it
25 is implementation, the main survey. I don't know how

1 many opinions are contained within that chapter. I don't
2 know if -- I don't recall. As I remember the CV study, I
3 mean I know it's voluminous. I don't recall whether
4 opinions were broken out under each chapter. If they
5 were not, is there a listing of opinions to be offered
6 under implementation of main survey and are Chapman,
7 Krosnick and Tourangeau all equally prepared to offer any
8 opinions that would come under that chapter?

9 MS. MOLL: Well, let me answer you this way,
10 Your Honor. Particular authors, of course, have
11 particular areas of expertise. So for example, Drs.
12 Krosnick and Tourangeau, their area of expertise -- I'm
13 painting with a wide brush I realize here -- but is
14 survey methodology. So, for issues relating to survey
15 methodology one of them is a likely candidate although in
16 the description of what was done here, you know, Mr.
17 Chapman is certainly capable of describing what happened
18 here. Let me comment if I could -- (Interrupted)

19 THE COURT: Let me stop you for just a second.
20 If for example you told the defendants, all right, with
21 respect to implementation of the main survey, opinions on
22 survey methodology would be offered by Krosnick,
23 Tourangeau, possibly Chapman. Opinions on other issues
24 under that chapter would be handled by Chapman. Would
25 that not at least break it down for them so that -- I

1 mean, I don't know how many opinions are within that
2 chapter, but say there were 10 opinions to be offered,
3 I mean, at least if it gave them some heads-up. If
4 they're going to have to depose all seven and under the
5 circumstances then they may have to depose all seven.
6 What I'm trying to figure out is a way to enable them to
7 do that in the most efficient fashion and not burden
8 them, and I think it would be helpful whether -- it might
9 be an open question whether Rule 26 requires specifically
10 that every expert -- if there's a collaborative type
11 report that every expert identify his specific opinions.
12 But I think in fairness whatever you can give them and
13 give them something here, but if you can give them
14 something more specific on the areas of testimony for
15 these particular witnesses, it would be helpful in
16 getting this whole thing done. And I think one could
17 read Rule 26 as requiring that.

18 MS. MOLL: I guess then the question is, Your
19 Honor, what kind of breakdown is the state going to be
20 obligated to produce? I don't want there to be an open
21 question on that.

22 THE COURT: Mr. Ehrich, I think, outlined what
23 they apparently have done on his side in terms of -- he's
24 gone on farther and said here's who our testifying
25 expert's going to be. He will be relying on -- for

1 certain parts, he'll be relying on these other witnesses
2 and they may be called to testify on those particular
3 subjects. I guess that's what he's done. I think that's
4 the way he broadly outlined it. Could not the state do
5 similar to that?

6 MS. MOLL: If the state is ordered to do the
7 equivalent, I guess, of what they produced just a couple
8 of days ago, I think we can. Anything more than that I
9 think is not appropriate and probably not even possible
10 at this juncture.

11 THE COURT: How are you interpreting what they
12 did a couple days ago?

13 MS. MOLL: Well, forgive me, Your Honor. I
14 think we've produced it as an exhibit to our response
15 brief. But what they did in -- when they produced their
16 most recent expert reports, they included a letter.
17 We've attached it as Exhibit 15.

18 THE COURT: Which document are you looking at?
19 Which docket number? Because I'll never track all this
20 down.

21 MS. MOLL: It's Exhibit 15 to Document Number
22 1952. What they did there was say that this report is a
23 collaborative effort of the authors and each may address
24 all matters in the report. But then they go on to say
25 recognizing the possible time limitations at trial, the

1 defendants may call at trial William Desvouges to
2 testify as to all the matters addressed in the report.
3 The defendants may further call a trial Gordon Rousser to
4 testify specifically as to the statistical an econometric
5 analysis and the results therefrom in the report. With
6 regard to a separate report, they say this report is a
7 collaborative effort of Drs. Connolly, Sullivan and Cole,
8 recognizing the possible time limitations at trial,
9 whoever the defendants may call at trial, John Connolly
10 to testify to the matters addressed in Sections One, Two
11 and Three of this report and Frank Cole to testify to the
12 matters addressed in Sections One and Four of the report.
13 So that's what they've done there. And I think it's
14 important to note though that even the defendants have
15 acknowledged some overlap potentially of witnesses
16 testifying on the same chapters and we would have to do
17 the same.

18 THE COURT: Sure. I think that's fine. I
19 think if you did what they've done, if that's the
20 model -- first of all, the only defendants, I think, that
21 have really pushed the issue is Cargill. The other
22 defendants seemed to be -- seemed to have been marching
23 forward to taking these depositions. But Cargill wants
24 more specific information. But if they've broken down
25 their expert report to that extent to give you who would

1 be the overall -- kind of the overall witness and then
2 potentially maybe there's more than one, and then who
3 would testify as to subparts, if you could do the same
4 thing, I think that would be fair game. If that was fair
5 for them it should be fair for you. Give them that
6 information and then it sounds like they're going to have
7 to go on and take all seven depositions, but at least
8 they could do that with a better handle on specifically
9 what each witness is going to be addressing. Do you
10 think you can do that?

11 MS. MOLL: If that's the Court's order, we'll
12 certainly comply with that.

13 THE COURT: Mr. Ehrich?

14 MR. EHRICH: Well, Your Honor, if I may, maybe
15 talk a bit more about that. You have seen, Your Honor,
16 the lead authors -- (Interrupted)

17 THE COURT: I've seen the -- (Interrupted)

18 MR. EHRICH: -- disclosure that they made.

19 THE COURT: On the chapters?

20 MR. EHRICH: Yes.

21 THE COURT: Yes, I've got that right here.

22 MR. EHRICH: Well, you know, if I can direct
23 the Court's attention to that specifically in reference
24 to the suggestion that the plaintiff do something, do
25 what we have done. It doesn't help us if all the

1 plaintiff says is, well, look at Chapter 7, the ultimate
2 chapter, where the ultimate conclusions are contained.
3 Chapman, Hanemann, Kanninen, Morey and Tourangeau, they
4 all might testify to that. That doesn't help us any --
5 they're not going to call, you know, all five of those
6 people at trial. That doesn't help us and that's not
7 what we did. We said Dr. Desvouges, which is going to
8 testify as to all matters in the report. Now we might
9 find it necessary because of developments to focus on the
10 econometric analysis that we think demonstrates the bias
11 that we built into the study, and we might find it
12 necessary to call him, but we said otherwise you go right
13 at Dr. Desvouges. So it doesn't help us if they say on
14 Chapter Seven, here's all five of them, on Chapters --
15 Chapter Six, well, any one of these six can give us the
16 opinions.

17 Why doesn't that help us? For one thing, they
18 don't all have the same credentials. There's a survey
19 methodology folks, if memory serves, there's a
20 psychologist, there's a three economists. They can't
21 possibly testify to everything. So, you know, I --
22 here's where I come out and here's where the Cargill
23 defendants come out and Peterson, Simmons, George's
24 joined the motion today. So it isn't just a Cargill
25 motion. That is -- the state focuses on the main part.

1 Well, that -- (Interrupted)

2 THE COURT: They've got to have a -- they've
3 got to list the experts who may -- (Interrupted)

4 MR. EHRICH: Who may, but then the opinions and
5 the bases therefore. So, just because there's some
6 uncertainty as to who you might call at trial doesn't
7 excuse you from identifying the opinions and bases
8 therefore for every testifying expert. And so, that
9 requires more than them to simply say you know on Chapter
10 Seven, here's five people, they all might testify to
11 that. That doesn't tell us anything.

12 Your Honor, if I may, we've got a rough
13 transcript here from the deposition of Chapman yesterday.

14 I think this illustrates the point that I just made.
15 This is -- I believe this is at page 112, line 19.

16 Question: Do you intend to testify at trial about the
17 conclusions of this expert report? Answer: I'm
18 available to testify. I don't know whether I'll be
19 called to testify. I'm available to be testified if I'm
20 asked. Question again on page 113: Do you have an
21 understanding about what you will testify at trial about?
22 Again, I don't know specifically what I would be asked to
23 testify about. Can you point to any particular sections
24 of the report that you would testify about at trial?
25 Again, I don't know what I'm going to be asked to testify

1 so I can't tell you. I would be willing to testify about
2 any portions of the report that would be appropriate.

3 Well, then, the balance the afternoon was spent
4 focused on this and the bottom line is -- this is my
5 characterization, but we'll introduce the rough
6 transcript if you want. Chapter One, well, I worked on
7 that Dr. Chapman said. Well, what happened? Well, a
8 junior person drafted and then I looked at it and then I
9 sat around with the rest and we all got on the -- you
10 know, on a web ex together and we wrote it. Well, can
11 you map out what each person wrote? I can't map out what
12 each person wrote. So, at the end of the day, Your
13 Honor, just being told any one of these six in these
14 chapters or five or four could testify to this doesn't
15 allow us to get at who the expert is, whether the
16 expert's qualified, whether he's relying on material that
17 an expert in his or her field would normally rely on and
18 whether anything they have to say is admissible at all.
19 So it doesn't help us. I think instead what they need to
20 do is to say we may call doctor blank to testify about
21 the following sections or the opinions in this section of
22 the report. They call doctor, who knows, Hanemann, to be
23 the integrating expert that capstone of our damage case
24 to testify about this sort of thing. Once we have that
25 disclosure we can determine how to depose these folks.

1 Does what Dr. Tourangeau said about survey methodology,
2 can Dr. Hanemann truly rely on that? Does he know enough
3 about it? That's the sort of inquiry that we're allowed
4 to have. We're not saying, as the plaintiff suggests,
5 that multi-authored reports are invalid. No, of course,
6 in this incredibly complicated litigation, you know,
7 they're not only necessary, but they're allowed. We have
8 done it too. But that doesn't excuse noncompliance with
9 the rule. We have the right to know what people are
10 going to say so we can test that before we actually get
11 in front of the Court and a jury at trial. So, those are
12 my thoughts, Your Honor.

13 THE COURT: Ms. Moll, anything else?

14 MS. MOLL: Well, Your Honor, it remains unclear
15 to me what the Cargill defendants actually want. Do they
16 want a breakdown subsection by subsection of the report
17 and who may testify as to the findings therein or are
18 they suggesting that separate reports be produced for
19 each -- (Interrupted)

20 THE COURT: Well, if Mr. Ehrich just said and
21 what he quoted from the deposition, I mean, if that's an
22 accurate sort of synopsis of what went on, it mean to ask
23 Chapman as kind of the -- as I understood it, was going
24 to be the leadoff witness on this report and from him all
25 the coordinating parts would be identified in some way,

1 and to ask him what are you going to testify to and what
2 opinions are you going to offer and he says I don't -- I
3 can't really say whatever would be appropriate, I don't
4 know that that satisfies Rule 26. I mean, these folks
5 are supposed to be coming forward laying out their
6 opinions and laying out the basis for those opinions.
7 Now, so it's in the report. But if he's going to testify
8 to it and then I think he has to essentially adopt the
9 report and say here's what the opinions that I'm adopting
10 and here's what they're based on, and I think that's true
11 of all these folks. If they can't get up there and at
12 least tell them what opinions they're going to offer,
13 then I don't know that there's been as much good --
14 (Interrupted)

15 MS. MOLL: Well, I was at Mr. Chapman's
16 deposition yesterday. And I think -- (Interrupted)

17 THE COURT: You have a different view of it.

18 MS. MOLL: I do. Mr. Chapman in the context of
19 the excerpt that Mr. Ehrich just read from, he was asked
20 what are you going to testify to. As Mr. Chapman sat
21 there yesterday, did he know what particular portions of
22 the report he would be asked to testify about for certain
23 when the trial comes up in September? No. But could Mr.
24 Chapman walk through the report and say I worked on this,
25 let me describe my involvement in the project, let me

1 describe my area of expertise and let me walk through,
2 you know, the different chapters and, you know, the
3 Cargill defendants had the opportunity to depose him in
4 that manner -- (Interrupted)

5 THE COURT: In the report is there a specific
6 list of the opinions to be offered? I don't recall. I
7 mean, it seems like the report -- the opinions are sort
8 of integrated throughout the report and it's not --
9 (Interrupted)

10 MS. MOLL: They're integrated but there is a
11 breakdown in the report.

12 THE COURT: These are the opinions to be
13 offered?

14 MS. MOLL: Yes. I mean, it's not an isolated
15 list or anything like that. But there is a breakdown
16 within each chapter of the analysis.

17 THE COURT: Not the specific opinions, expert
18 opinions. But there's no link from that to a specific
19 witness?

20 MS. MOLL: We've provided that mapping at
21 Exhibit 5. So we know from -- (Interrupted)

22 THE COURT: That's the chapter breakdown?

23 MS. MOLL: Correct.

24 THE COURT: But within that chapter, I mean, if
25 there's a multiple of opinions within that chapter and

1 there's five people listed, someone of those five may not
2 be competent or prepared to testify in every one of those
3 opinions. So what I'm trying to find out is there
4 anything that would say -- I mean, when you list these
5 people are you saying that every one of these witnesses
6 can testify and will be prepared to testify as to every
7 opinion in that chapter?

8 MS. MOLL: I'm not suggesting that, Your Honor.

9 THE COURT: Then I think short of that, then
10 I've got -- you know, I've got some difficulty with
11 letting -- making sure that they have enough information
12 about who's going to say what.

13 MS. MOLL: Understood. And we can work quickly
14 to provide a further breakdown. But I don't want the
15 entire schedule to be thwarted because of that.

16 THE COURT: Nor do I. And I think the solution
17 to that is to do that as quickly and thoroughly as
18 possible so that we can get this thing back on track. I
19 don't want to be fighting about whether a two sentence
20 description of Dr. Bishop's opinions under Chapter Two is
21 sufficient or not. But some amount of information has to
22 be given to them so they can march forward with a better
23 handle on what opinions Bishop is going to offer under
24 economic theory and measurement and then they'll know --
25 and then again on what opinions he's going to offer under

1 development of the survey instruments particularly where
2 his opinions may not be exactly the same as Dr.
3 Krosnick's. And so, if Krosnick can be interrogated on
4 his and is he relying on Bishop for this part of it and
5 is Bishop relying on Krosnick, how is that going to work
6 because it all dovetails into the issue of what's the
7 basis for the opinions they're offering and they're
8 supposed to have that. So if Bishop has formulated
9 opinions and analysis that Krosnick is then relying on
10 for further opinions, I think that needs to be made
11 clear. Again, I'm not saying -- I'm certainly not
12 suggesting that we redo reports here, but I think some
13 fleshing out of specific areas and opinions that are
14 going to be offered by each of these people under these
15 chapters is necessary for them to really be prepared to
16 go forward at the depositions.

17 MR. MOLL: If I could make a suggestion, Your
18 Honor.

19 THE COURT: All right. Good.

20 MS. MOLL: Mr. Ehrich has suggested that Dr.
21 Tourangeau's deposition go forward tomorrow. He is in
22 fact already in Tulsa and ready to go tomorrow. So I
23 would agree that we do that.

24 THE COURT: I think that makes sense.

25 MS. MOLL: We could endeavor to provide the

1 breakdown that Your Honor has just described by the end
2 of this week. But if I could suggest that the depos that
3 have been held for next week, that they go forward.

4 THE COURT: Let me see.

5 MS. MOLL: I'll give you the specifics, Your
6 Honor. For April 14th which is next Tuesday, we have
7 held that date open for Dr. Rich Bishop. The following
8 day, April 15th, we have held for Dr. Hanemann, and the
9 following day we have held for Dr. Kanninen. I would
10 suggest that we keep those dates in place.

11 THE COURT: When would you be able to give them
12 this more fulsome explanation of the opinions?

13 MS. MOLL: By the end of this week.

14 THE COURT: By the end of this week. So they
15 would have that by Friday and then would take up the
16 depositions Tuesday, Wednesday, Thursday. That's your
17 proposal.

18 MS. MOLL: And with regard to Dr. Morey's
19 deposition which is on Friday, we could agree to suspend
20 that.

21 THE COURT: He's set for this Friday?

22 MS. MOLL: Correct.

23 THE COURT: He's set for the 10th?

24 MS. MOLL: Yes.

25 THE COURT: All right. Mr. Ehrich. I mean,

1 we've got to find a solution here that's going to work
2 and -- (Interrupted)

3 MR. EHRICH: Well, Your Honor, and we're trying
4 to be part of the solution, not part of the problem. But
5 just as you heard Mr. Nance a few minutes ago say, well,
6 you know, I'll look at list but I'm going to need some
7 time, I'm supposed to -- you know, I'm supposed to commit
8 to taking the depositions of an additional five experts
9 based on a disclosure I don't even know about, which to
10 be candid, I don't hear a lot of specificity, Your Honor,
11 on what they're supposed to do. Now, we suggested almost
12 from the first that we be allowed to take -- when this
13 dispute arose, be allowed to put this in front of Your
14 Honor and you resolve it. It sounds like we're on our
15 way to doing that. And then be allowed to take
16 depositions out of time as to which ones we think are
17 necessary and we suggest May 1. I still think that ought
18 to be an appropriate proposal. If we get an appropriate
19 disclosure and don't have to come back here, Your Honor,
20 and discuss it some more, we may very well conclude that
21 some of these folks are not really going to be testifying
22 experts or we may decide we want to take all of their
23 depositions. But I'm hesitant to make that decision
24 today. And I remind you one thing we learned -- you may
25 remember back in February we talked about the vast scope

1 of this effort. One thing we learned yesterday was just
2 how long the plaintiffs have been working at this.
3 Chapman testified he was already working on this in
4 December of 2004, six months before this case is filed.
5 They've spent more than four years. They've spent four
6 and a half million dollars just on Stratus and not on all
7 the other economists. And with all do respect, I think
8 we are doing a great job to get a rebuttal report done in
9 90 days and I would ask the Court's indulgence for us to
10 have a bit longer to consider these depositions and to
11 get ready for them once we finally have the appropriate
12 disclosure. I mean, the plaintiffs after all said they
13 needed 29 days after we gave them our rebuttal reports in
14 order to be ready to take our expert depositions. I
15 don't think it's fair for us to be, you know, if you
16 will, held at gunpoint, get this disclosure by close of
17 business Friday and be prepared the following Tuesday to
18 take up these depositions and just march them until
19 they're done. We have been prejudiced here by this lack
20 of disclosure and the lack of forthcoming by the
21 plaintiffs and we pledge to do this very quickly before
22 May 1. We're not going to come and ask you for
23 additional time on the dispositive motions. We'll be
24 ready. We'll get them done. But we can't be put to
25 making this decision right now. That's what I have to

1 say.

2 THE COURT: All right. Look, I think we --
3 that seems reasonable to me to put off Bishop, Hanemann
4 and Kanninen as well to give them an opportunity to get a
5 more specific detail on who's going to testify to what so
6 they can decide whether they need to take these
7 depositions or not given they're to be done by May 1. In
8 any event, they be done by May 1.

9 MR. EHRICH: Your Honor, if I could ask a -- I
10 didn't hear about Morey. He's scheduled for Friday. We
11 propose to vacate that one.

12 THE COURT: Right. They agreed to suspend --
13 now, Tourangeau would go forward.

14 MR. EHRICH: Yes, Your Honor.

15 THE COURT: Morey would be suspended. Bishop,
16 Hanemann and Kanninen would be suspended with the idea
17 that they be completed by May 1 if they're going to be
18 taken after you've gotten this more detailed explanation
19 of what the individual expert's opinions are going to be.

20 MR. EHRICH: Yes, Your Honor. I'm sorry. Some
21 people say the hair is the first thing to go. For me is
22 the ears. Did you say Krosnick too in that list?
23 Krosnick is not yet scheduled.

24 THE COURT: No, I didn't list him in that one.

25 MR. EHRICH: Krosnick is not yet scheduled. He

1 is -- (Interrupted)

2 THE COURT: He would also have to be done by
3 May 1.

4 MR. EHRICH: Correct. Yes.

5 THE COURT: So, the only -- we've got Chapman
6 and then we'll go forward with Tourangeau. And then
7 Bishop, Hanemann, Morey, Kanninen, Krosnick we'll wait
8 on, but they're to be done by May 1.

9 MR. EHRICH: Yes. If that brings us up to
10 seven, that's right.

11 THE COURT: I think that does. Yes, that
12 should bring us up to seven.

13 MR. EHRICH: Thank you, Your Honor.

14 THE COURT: We will put out a written order
15 that attempts at least to make sure we've got this all
16 memorialized. Fortunately we've got a court reporter so
17 that should be of great assistance. All right. So
18 that's the Court's decision on 1940 which is the motion
19 to compel complete expert disclosures. We've dealt with
20 141.

21 We've got 146 which all defendants have asked
22 to extend the April 16th discovery deadline for certain
23 depositions. The response cost witnesses of which you
24 say there are eleven. The damage experts, are those the
25 seven we just talked about?

1 MR. TUCKER: Your Honor, they've been -- if I
2 might kind of refresh where we are, refresh the page on
3 the browser. Looking at page one of Document 1946, I
4 believe that the item one -- as I understand, those are
5 now scheduled to take place on the 15th and 16th. And
6 so, the witness scheduling is most likely moot. The
7 reason I say most likely is the documents from the
8 Oklahoma Water Resources Board that are to go with those
9 depositions, those witnesses have not yet been produced.
10 Although they have been promised by the plaintiff, they
11 have not yet been produced. The item number two has to
12 do with Stratus and Your Honor just dealt with the
13 Stratus reports. Item number three, Mr. Quang or Mr.
14 Pham whichever it is is correct. Parties have agreed to
15 a new deposition date after the 16th, but we'd like the
16 blessing of the Court on that.

17 THE COURT: What date did you agree to on that
18 one, do you remember?

19 MR. TUCKER: No, but we have agreed to it.

20 THE COURT: You've agreed to something that's
21 after April 16th.

22 MR. EHRICH: The agreeing parties aren't
23 present, but they did it.

24 THE COURT: A lot may depend on how far after
25 April 16 we're talking about.

1 MR. TUCKER: I think it's very shortly
2 thereafter.

3 THE COURT: I thought that the state was
4 opposing that deposition at all because he was part of
5 the initial disclosures and --

6 MR. BULLOCK: That was the deposition that -- I
7 don't know that.

8 THE COURT: If there's been some conversation
9 -- (Interrupted)

10 MR. TUCKER: Well, Ms. Hill advised me that
11 there had been an agreement reached on it on which I
12 would think that likely there would -- he's not here.
13 He's in deposition and he's not here.

14 MR. NANCE: The two lawyers who may or may not
15 have agreed are both in deposition and no one here is
16 aware that we've agreed to anything. If we have we
17 certainly will look -- (Interrupted)

18 THE COURT: Honor it. But we don't know
19 whether they are or they haven't or -- we do know there's
20 two lawyers that are in deposition.

21 MR. NANCE: There are at least two, Judge.

22 THE COURT: That they may or may not have
23 agreed.

24 MR. TUCKER: Let me put a question mark by that
25 one. If we may call them, could we address --

1 (Interrupted)

2 THE COURT: We'll take a break here in a couple
3 minutes. But as far as -- let me understand. As far as
4 the response cost witnesses, you say that's been decided
5 that they're going to go forward on the 15th and 16th?

6 MR. TUCKER: That's correct.

7 THE COURT: Okay. Great.

8 MR. TUCKER: Item four, the poultry and egg
9 association, that has been rescheduled by agreement
10 within the discovery period.

11 THE COURT: Then we've addressed --

12 (Interrupted)

13 MR. TUCKER: We've addressed -- (Interrupted)

14 THE COURT -- Cargill's 30(b)(6)?

15 MR. TUCKER: That's correct. There is -- then
16 there is the parties have agreed to their witness, the
17 economist witness or accountant witness Payne for the
18 27th and 28th. The parties have agreed to that, but
19 again we'd like the Court's acceptance of that.

20 THE COURT: One issue that came up, I think,
21 and that was whether or not the defendants had produced
22 the balance sheet data that the Court had ordered before.
23 Has that been done now?

24 MR. TUCKER: I know that we have.

25 THE COURT: Are we all set with that?

1 MR. BULLOCK: No. We've not received it.

2 THE COURT: I think before that deposition that
3 needs to be produced.

4 MR. EHRICH: May I, Your Honor?

5 THE COURT: Yes.

6 MR. EHRICH: Del Ehrich for Cargill. There's a
7 dispute about this. Your Honor resolved the state's
8 motion to compel additional financial information --
9 (Interrupted)

10 THE COURT: Pretty simple.

11 MR. EHRICH: Balance sheet information
12 sufficient to show net worth. We believe we have done
13 that for Cargill and we've not had a communication from
14 the plaintiff to the contrary. Supposedly there are --
15 you know, plaintiff's lawyer has said to me, at least,
16 well, I may be communicating with the defendants, but in
17 the meantime, schedule a deposition. That's all we know.

18 THE COURT: I think the order said produce the
19 balance sheet from the last audited financial statement
20 and the most recent balance sheet. So if you've done
21 that, then you're in compliance and -- (Interrupted)

22 MR. EHRICH: We -- (Interrupted)

23 THE COURT: If you haven't done that, then you
24 may not get the chance to depose Mr. Payne. Yes, ma'am.

25 MS. XIDIS: Your Honor, Claire Xidis for the

1 State of Oklahoma. I actually was working on those
2 motions. Since that hearing and since your order we have
3 not received one additional document from any of the
4 defendants. As you'll recall, Cargill was, I believe,
5 the most deficient in its production. They have not
6 produced -- (Interrupted)

7 THE COURT: Sort of an excerpt as I recall.

8 MS. XIDIS: Yes, a one page summary with about
9 eight lines of information -- (Interrupted)

10 THE COURT: I tried to be as specific as I
11 could and not put any terrific burden, I mean, given that
12 what I understand that the plaintiffs are entitled to.
13 So that stuff needs to be done. And if we're not going
14 to get that done, then Mr. Payne's deposition may just
15 not get to be taken, so I would go ahead and redeliver --
16 deliver if you think you have to. But it was the balance
17 sheet from the last audited financial and the most recent
18 balance sheet. Those two things.

19 MR. EHRICH: We have provided that. Your
20 Honor, we provided that back in October -- (Interrupted)

21 THE COURT: What I saw was I thought was sort
22 of an excerpted version. But go back and check. If
23 you're comfortable with that, fine. If you're not I
24 would talk to the other side and make sure that
25 everybody's in agreement on that.

1 MR. EHRICH: She needs to -- (Interrupted)
2 MS. XIDIS: The question is whether anything
3 has been produced since that order. And unless Mr.
4 Ehrich can tell us that something new has been produced,
5 I think the issue here is very clear.

6 THE COURT: What I thought I saw from Cargill
7 did not meet the standard I just articulated. But it's
8 been awhile since I've looked at this stuff. I thought
9 there was an excerpt of information perhaps taken from
10 what you would say would be the audited -- the balance
11 sheet from the audited financial, but it was excerpted
12 information. What I ordered was the actual balance sheet
13 from the last audited financial and the last unaudited
14 balance sheet. So why don't you folks check and see if
15 you've done that? There's no sense in wasting a lot of
16 time here. That should be pretty easy to produce. It's
17 been ordered to be produced, so let's just see whether
18 you've done it or not and go from there.

19 MR. EHRICH: We'll check, Your Honor.

20 THE COURT: All right. So -- (Interrupted)

21 MR. GRAVES: Your Honor, this is James Graves
22 for George's. I just have a question about that and I
23 don't want to waste the Court's time either. But we did
24 produce a balance sheet, a pretty detailed balance sheet.
25 But on the parent company, if you'll recall, we sought a

1 protective order. I don't know if you're telling me now
2 that you denied that protective order. I understood your
3 order to say that we actually produced more than what
4 would ordinarily be required. And the reason we produced
5 the balance sheet that we did which was not an audited
6 balance sheet, it was created for the purposes of
7 litigation was an order to not make a lot of disclosures
8 about other corporations that aren't defendants in this
9 case which will be the case we produced a George's, Inc.
10 audited balance sheet.

11 THE COURT: Well, I think the order said for
12 each of the defendants produce the balance sheet from
13 your last audited financial statement and your last
14 balance sheet and that would get this done. And it would
15 be put under protective order so there wouldn't have to
16 be all this additional redaction. And the fact that we
17 cut it all down instead of giving the full financial
18 statements with all that other supplemental information
19 would keep it simple enough that we shouldn't be,
20 frankly, having this conversation.

21 MR. GRAVES: My other question would be that
22 for some of these private companies, I don't know that
23 they're all on the same boat, but on the subs those
24 balance sheets aren't audited. They don't get those
25 audited. So, if the order is ordering an audited balance

1 sheet, that's not capable of being complied with.

2 THE COURT: Okay. Well, then if that's not
3 possible, then give the other side what you can produce
4 -- (Interrupted)

5 MR. GRAVES: That's what we did.

6 THE COURT: -- in compliance with that order
7 and tell them that that's the situation. You know, we
8 can't force somebody to do what they cannot do. I'm not
9 going to force somebody to go out and get an audited
10 financial statement between now and Monday so that they
11 can produce the balance sheet. Do the best they can and
12 there weren't distinctions between these various
13 companies and some of them frankly are fine enough
14 distinctions it's pretty hard for me to understand who's
15 got different types of financial information. So, the
16 idea is to give you enough information so that you know
17 what the net worth of the company is. And we're talking
18 about punitive damage issue down the road, so I think
19 that should be sufficient. Check and see what you --
20 (Interrupted)

21 MR. HIXON: Your Honor, I don't want to beat a
22 dead horse. In Peterson's position the last -- the most
23 recent balance sheet and the last audited balance sheet
24 -- 2007 balance sheet has already been produced to the
25 state and we still stand by our representation that we'll

1 produce the fiscal year 2008 balance sheet when it
2 becomes available.

3 THE COURT: I think that's fine. Again, I'm
4 not ordering people to do stuff that's impossible to do.
5 So whatever you've got in hand, give it over and that
6 should be -- we should be over this hurdle. Okay.

7 MR. TUCKER: The last point that I -- it is my
8 belief that I think that we have agreed that Dr. Ebber's
9 deposition will be taken in Kentucky on the 23rd.

10 MR. BULLOCK: Yes, that's correct.

11 MR. TUCKER: Got that one right --
12 (Interrupted)

13 THE COURT: We're on to the -- well, there's a
14 list of agreed depositions -- (Interrupted)

15 MR. TUCKER: That's on that list as well, Your
16 Honor.

17 THE COURT: Right. There's Jones, Chadwick,
18 Cummins, Merritt, Edwards and Rausser. We're jumping
19 ahead a little bit here. Those are the ones that go from
20 Edwards on the 23rd all the way to Merritt on June 30th?

21 MR. TUCKER: That is correct.

22 THE COURT: Now, that obviously is considerably
23 past the dispositive motion deadline. So my view on that
24 is don't expect to be using -- if you're going to agree
25 to take those depositions that far down the road, don't

1 expect to be adding that into the motion for summary
2 judgment. You made that -- essentially you made that
3 decision by your conduct if not by agreement. So you're
4 going to have to live with that part because we want to
5 live with the schedule.

6 MR. BULLOCK: We understand that, Your Honor.

7 THE COURT: Is there anything -- well, we
8 jumped ahead now. Is there anything else we need to
9 touch on? Do we need to take a break and --

10 MR. BULLOCK: Mr. George and I have a matter
11 that's come up here in the last few days and we'll need
12 your time. We might take a break and have folks get a
13 sip of water. But I know we have that one.

14 THE COURT: Okay.

15 MR. TUCKER: We need to figure out --

16 THE COURT: Yes, I mean --

17 MR. BULLOCK: We need to call -- (Interrupted)

18 THE COURT: Why don't you see if you can make a
19 call on that one and see if -- my view is that if you can
20 get these depositions as much done by the 16th, that's
21 great. We've given you some leeway to the 15th on these
22 experts so I don't have as much heartburn on going out
23 even to the 15th on the fact witnesses. When we start
24 pushing into June realizing that's going to impact
25 summary judgment, you're just not going to able to use

1 that stuff. Then with that understanding, we can do
2 that.

3 MR. BULLOCK: I just want to clarify the
4 Court's instruction on that. As you can well understand,
5 we're anxious to get discovery closed understanding that
6 there are details. But the Court's comments, and you've
7 said this a couple of times about not having -- going
8 forward, I'm trying to find out whether the Court is
9 envisioning the general relaxing of the discovery
10 deadline or is it these discovery extensions that have
11 been granted?

12 THE COURT: I think these specific extensions.
13 I'm certainly not opening the door to a whole lot more
14 discovery of a general nature. That should have been
15 done and we're holding to the April 16th deadline and
16 making some exception to allow some depositions to be
17 conducted after the 16th that should have been done
18 beforehand, but given the practicalities the case, fine,
19 we'll try to work with you on that. But the overarching
20 goal here is to adhere to the scheduled dates that Judge
21 Frizzell has set and try to get this thing moving along
22 so that discovery is done in a timely fashion, that
23 you're ready to roll on your dispositive motions on May
24 18th, and that all the things that come thereafter, the
25 exhibits and deposition designations on June 1st,

1 instructions July 6th, motions in limine, pretrial
2 briefs, all that sort of thing are done in a timely
3 fashion and then you can set a pretrial conference date
4 and you may need to think about that, too, if you're
5 looking at trial in September when would that pretrial
6 be. We'll take a short break while you folks mull that
7 over a bit and then hopefully we can come back and wrap
8 up and deal with this last issue.

9 (Whereupon, a short recess was held after which
10 the following record was made.)

11 THE COURT: Before I forget, I don't know if
12 it's in the schedule or not, but I think there was an
13 indication that the parties should make a request for a
14 pretrial conference by the 16th?

15 MR. BULLOCK: Yes. The language wasn't real
16 clear to us. In fact, Mr. George and I had a
17 conversation about this. I do recall talking
18 specifically to him. And -- (Interrupted)

19 THE COURT: So the parties just make sure that
20 you file something requesting -- you might get together
21 on when you want that or I don't know what was expected,
22 but something was to be requested by the 16th.

23 MR. BULLOCK: What we were thinking of doing is
24 to ask the Court to actually hold a conference so that we
25 can talk about structuring the remainder of the case.

1 And rather than presupposing the Court's calendar or
2 schedule, it seemed to make sense that we have a
3 conference to talk about those issues and be sure
4 everybody's on the same page.

5 THE COURT: You know, whether it's called
6 pretrial conference or status conference, I know that the
7 Court is anticipating -- and when I say the Court, I mean
8 I think Judge Frizzell is anticipating they'll be a
9 request filed for this status or for this pretrial
10 conference. And I think you can -- you may in your
11 application define it in maybe a little bit broader term
12 and that would make some sense it seems to me.

13 MR. BULLOCK: There may be some wisdom in
14 having a more complex pretrial conference structure than
15 -- (Interrupted)

16 THE COURT: Complex is -- maybe there's some
17 wisdom in that. I guess it depends on your perspective.

18 MR. BULLOCK: We seem to bring complexity in
19 our wake.

20 THE COURT: Complexity is here, there's no
21 question about that. Also, would it be possible for one
22 of the parties -- and let me ask the defendants -- to
23 prepare an agreed order on what we've done today and
24 submit it to the Court, say, by the end of the week?
25 You've got the use of the court reporter. I've got -- I

1 understand what some of the dates are and if we need
2 to -- if there's a question about that, we can address
3 that. It would be helpful to the Court if somebody would
4 prepare an order kind of memorializing what we've done
5 here today.

6 MR. TUCKER: May we inquire about the
7 availability of the transcript?

8 THE COURT: Okay. It's a deal?

9 MR. TUCKER: Yes, Your Honor.

10 THE COURT: All right. Now, Quang Pham. Have
11 we figured out whether he's been scheduled up or not?

12 MR. NANCE: Your Honor, we have a difference of
13 agreement on whether we have an agreement, so I think we
14 don't have an agreement. We have a proposal that we are
15 discussing and that is he has been traveling
16 internationally. We propose to extend for him to the
17 week of the 20th.

18 THE COURT: April 20th.

19 MR. NANCE: The week of April 20th. And we're
20 waiting to see availability of someone to take his
21 deposition.

22 THE COURT: Who is he, just out of curiosity?

23 MR. NANCE: I think no one on our side of the
24 case knows.

25 THE COURT: He was in your initial disclosures

1 and on your witness list, I think.

2 MR. LENNINGTON: He's an inadvertent person
3 listed that has later withdrawn -- do this in a case with
4 hundreds of potential witnesses.

5 THE COURT: So, you're not planning on calling
6 -- (Interrupted)

7 MR. NANCE: Right. We've told them we're not
8 planning to call him, but they've persisted in wanting to
9 take his deposition anyway. And that would not be the
10 only time that's happened but --

11 THE COURT: Mr. Hixon, your by god torpedoes --
12 (Interrupted)

13 MR. HIXON: I'm as informed as anyone sitting
14 on this side of the room on -- (Interrupted)

15 THE COURT: -- anywhere in the room you're
16 probably --

17 MR. HIXON: Mr. Pham currently works for ODAF
18 and he formerly worked for DEQ and he is somehow involved
19 in the CASRO program and that's the extent of my
20 knowledge as to who he is. He was noticed on --
21 (Interrupted)

22 THE COURT: You might take his deposition just
23 to find out who he is as much as anything.

24 MR. HIXON: Ms. Longwell has his deposition to
25 take. I'm waiting on her availability. He was noticed

1 on March 19th for deposition to occur on April 13th. Mr.
2 Trevor Hammons in the attorney general's office informed
3 Ms. Longwell that he was going to be traveling from April
4 4th until April 15th and we're told today that may be the
5 14th. And she had corresponded with Mr. Hammons and with
6 Sharon Gentry in the Oklahoma City office of Riggs, Abney
7 and they've corresponded back and forth. And it was
8 Nicole Longwell's understanding that there was an
9 agreement in principle to do it after the discovery
10 cutoff and she's never been given a date certain.

11 THE COURT: So you'll get it done by the 20th?

12 MR. HIXON: I don't know.

13 THE COURT: That's the proposal.

14 MR. HIXON: I don't know Ms. Longwell's
15 availability that week. I proposed to the state that we
16 have it done the first available day prior to May 1st. I
17 believe he's also on -- Mr. Pham's on the defendants'
18 witnesses list.

19 THE COURT: I think they've -- (Interrupted)

20 MR. HIXON: -- withdrew, but I believe he's
21 also on the defendants'.

22 THE COURT: Well, why don't we say by May 1 try
23 to get that scheduled? If you can do it by the 20th,
24 fine. Whatever works by agreement hopefully.

25 MR. NANCE: Yes, sir.

1 THE COURT: All right. Was there one remaining
2 issue, Mr. Bullock?

3 MR. GEORGE: Robert George on behalf of the
4 Tyson defendants. And Mr. Bullock and I have conferred
5 before we got here today and then again on the break and
6 I think we have resolution of one of the issues which was
7 a scheduling matter and at least a process for resolving
8 the second. But way of background, Your Honor, I believe
9 Monday or Tuesday of last week the State of Oklahoma
10 issued two depositions notices for Tyson representatives.
11 One is our chief environmental officer, Kevin Eagley, who
12 has been on or initial disclosures, is on our witness
13 list, is someone who is likely to be called at trial.
14 The date that was selected for that deposition was the
15 last day of discovery period, April the 16th. I intend,
16 if permitted, to defend that deposition and have a
17 settlement conference with Judge Eagan on the 16th of
18 April in another matter and Mr. Eagley is out of state.

19 THE COURT: So, you've got a conflict in
20 terms -- (Interrupted)

21 MR. GEORGE: A conflict as does the witness.
22 Mr. Bullock and I have agreed on the break today that
23 some alternative dates that are beyond the cutoff and not
24 too far in the future, namely May the 1st, I believe, on
25 which both Mr. Eagley and myself are available will be

1 the date of that deposition provided the Court allows us
2 to take it out of time.

3 THE COURT: Okay. Well, if he's not available
4 any other time than -- all right, you can take that on
5 May 1st.

6 MR. GEORGE: The second one is a little more
7 contentious, and in fact, there were likely be a motion
8 for protective order on it. On the same date last week
9 the state issued a deposition notice for John Tyson who
10 is the Chairman of the Board of Directors for Tyson Foods
11 and at some point in the past was our chief executive
12 officer, has not held that possession for several years.
13 But nevertheless, the state issued deposition notice for
14 Mr. Tyson, also setting it for last day of the discovery
15 cutoff, April the 16th. I have the same conflict that I
16 had before and Mr. Tyson is out of -- not out of state,
17 but out of town on a prior commitment. But laying aside
18 scheduling issues, it is the position of the defendant
19 that that deposition ought not go forward. Mr. Tyson is
20 not in a position, has not been in a position, to have
21 knowledge that's relevant to any of the issues beyond our
22 30(b)(6) witness that we put up -- put up several of them
23 on topics relevant to this case. He's not on any exhibit
24 list -- I'm sorry -- any witness list provided by the
25 defendants. I believe he is listed on the plaintiff's,

1 but not someone we intend to call. So, Mr. Bullock and I
2 tried to work through those issues together
3 unsuccessfully and so we would be filing a motion for
4 protective order with respect to that. It was my hope to
5 get it filed this week. Your Honor, I'm actually in
6 Oklahoma City the next three days for depositions in this
7 case, and so with the Court's indulgence and Mr.
8 Bullock's as well, I would like to file a motion for
9 protective order on Monday, and then Mr. Bullock can make
10 his own commitment as to when he could respond to that,
11 and then get another brief audience before Your Honor to
12 try to resolve that one final issue.

13 THE COURT: We might be able to do that by
14 telephone.

15 MR. BULLOCK: Yes.

16 MR. GEORGE: Certainly might, Your Honor.

17 THE COURT: Mr. Bullock.

18 MR. BULLOCK: We provided the motion for
19 protective order is filed as presented, I'm sure it will,
20 then we will allow to continue the deposition until the
21 Court can properly resolve it with the understanding that
22 it may extend beyond the discovery deadline.

23 THE COURT: When would you need -- how much
24 time would you need to respond to the protective order if
25 it's as represented?

1 MR. BULLOCK: You think you'll file yours --

2 (Interrupted)

3 MR. GEORGE: Monday.

4 MR. BULLOCK: I guess we probably could get our
5 response filed by Thursday, I think.

6 MR. GEORGE: What I had told Mr. Bullock, Your
7 Honor, is that in light of the scheduling issues which
8 are separate and apart from the substantive issues we
9 have as to whether that deposition will go forward, the
10 16th is really not an option, at least in my view it's
11 not, and so I'd like to go ahead and strike that date.
12 But if Mr. Bullock prevails on the motion for protective
13 order and this Court allows the deposition to proceed,
14 the defendants will not argue against that deposition
15 based upon the passage of the discovery period, so --

16 MR. BULLOCK: I thought we offered to continue
17 it until the Court resolves the matter.

18 THE COURT: All right. We'll continue it from
19 the 16th until the Court resolves the substantive issue
20 and then we'll see where we are after that.

21 MR. BULLOCK: There is one other issue.

22 There's clearly some misunderstanding between the two
23 sides as to the effects of the Court's order relative to
24 the financial documents.

25 THE COURT: If you'd step up to the podium just

1 to make sure we get you on the tape as well as the court
2 reporter.

3 MR. BULLOCK: There's clearly some
4 misunderstanding or disagreement, at least, as to the
5 effect of the Court's order relative to the financial
6 documents. I'd ask the Court to order that by the end of
7 the day on the 9th the defendants who are subject to that
8 order either provide us with the required information or
9 tell us why nothing else is required so that that matter
10 can be framed and we can get that detail cleared up if in
11 fact it warrants further clearing.

12 THE COURT: Okay. And again, I think we're
13 spending an awful lot of time on this particular issue.
14 I mean, after having looked at what we had done
15 historically in this Court -- I know that some courts
16 take a very different view and give wider, much wider,
17 discovery on the financial matter. We have generally
18 held it to the net worth number. Now, to me it seemed
19 like one of the issues that was coming up was, well, that
20 they've given us information but we don't know whether it
21 was audited or not and so to the extent that that was
22 really a legitimate concern, that's why I ordered to
23 provide a balance sheet from an audited financial.
24 Obviously, if an entity doesn't have an audited
25 financial, as I think Mr. Hixon has said with respect to

1 his client, maybe there are others in that boat, then you
2 can't comply with that. So I would think if you tell Ms.
3 Xidis what -- the best you can do, all I thought was give
4 a -- wind up with two balance sheets, the most recent one
5 and the last audited version. And if there's not a last
6 audited version, then I think you produce what is
7 available that can comply with the Court's order and then
8 just describe to her, and hopefully that will be good
9 enough. I can't imagine spending a whole more time on
10 the net worth number because I think even from the
11 information I saw, even though some of it was unaudited,
12 it sure seemed like it was a lot of information in there
13 from everybody that probably pretty much satisfied the
14 net worth request for purposes of punitive damage issue.

15 All right. We'll go along with Mr. Bullock's
16 suggestion that by the 9th either produce -- if you
17 haven't done so and you check and you find you haven't
18 complied with the Court's order in that regard, go ahead
19 and do so. And if you feel like you already have
20 complied with the Court's order in that regard and you
21 don't need to produce anything else, then go ahead and
22 tell -- would that be directed to Ms. Xidis?

23 MR. BULLOCK: That would be best, Your Honor.

24 THE COURT: Okay. Then we'll direct that to
25 Ms. Xidis. And Mr. Hixon, I'm not going -- (Interrupted)

1 MR. HIXON: -- one issue on that. I
2 communicated that information to Mr. Xidis and Ms. Ward
3 and Mr. Nance earlier this week. Do I need to
4 re-communicate that would prior notice be sufficient?

5 THE COURT: I think your prior notice. If they
6 received it, then I think that should be sufficient. If
7 there's any question about that, for the price of one
8 xerox copy and a stamp, it might be best to do it if you
9 think they're not going to agree that you've already
10 complied. But just to cover yourself. It sounds to me
11 if you've already conveyed that information to them and
12 you've already made that statement, I don't think --
13 (Interrupted)

14 MR. HIXON: I conveyed that here today and --
15 (Interrupted)

16 THE COURT: The order was to do it by the 9th.
17 It sounds like you got ahead of us and you've already
18 done it.

19 MR. HIXON: Thank you.

20 THE COURT: All right. If there's nothing
21 else, then we'll be in recess.

22 (END OF PROCEEDINGS)

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25

1 C E R T I F I C A T E

2 STATE OF OKLAHOMA)
3) SS.
4 COUNTY OF TULSA)

5 I, Greg Eustice, Certified Shorthand Reporter
6 in and for the State of Oklahoma, do hereby certify that
7 on April 7, 2009 the above Proceedings were held before
8 the Honorable Paul J. Cleary, Magistrate Judge in the
9 United States District Court for the Northern District of
10 Oklahoma, and that the same was reduced to writing by me
11 in stenograph, and thereafter transcribed by myself, and
12 is fully and accurately set forth in the preceding 73
13 pages.

14 I do further certify that I am not related to
15 nor attorney for any of the said parties, nor otherwise
16 interested in said action.

17 WITNESS my hand this 13th day of April, 2009.

18

19 S-Greg Eustice _____
20 GREG EUSTICE
21 Certified Shorthand Reporter

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